In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 751

REO MOTORS, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The petition for a writ of certiorari asserts that the present decision is wrong and raises an important question in the law of taxation, and there also is alleged a conflict with the decision of the Court of Appeals for the Fifth Circuit in *Commissioner* v. *Moore, Inc.*, 151 F. 2d 527, affirming 4 T. C. 404. We believe that the decision is clearly correct, but we agree with petitioner that the question is important and that a substantial conflict does exist, and for those reasons we do not oppose the granting of the petition in this case. However, since each of the conflicting decisions affirms a ruling of the Tax Court, it seems appropriate to add a few words on the nature of the asserted conflict.

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The Tax Court's decision in the *Moore* case was rendered by a single judge, whereas the present case was decided by the full Tax Court, over the dissent of the single judge who had rendered the earlier opinion. True, the majority herein attempted to distinguish its prior adverse decision in the *Moore* case, but the dissenting judge relied solely (R. 200) upon his prior opinion in the *Moore* case. The ground of the supposed distinction, which was not foreshadowed in the *Moore* opinion, was that the earlier case involved a 1942 amendment directly altering a provision of Section 122 (d) (4) of the Internal Revenue Code (governing the net operating loss deduction carry-over allowable for the 1942 taxable year), while the instant case concerns a 1942 amendment which did not change the provisions of Section 122 itself but rather altered another Code provision (Section 23 (g)) defining certain terms ("capital losses" and "capital assets") used in Section 122 (d) (4) (R. 199–200). In *Blackhawk-Perry Corp.* v. *Commissioner*, decided November 19, 1948 (1948 P-H T. C. Memorandum Decisions ¶48,245, now pending on taxpayer's appeal in the Court of Appeals for the Eighth Circuit), the Tax Court similarly distinguished the *Moore* case.

In brief and argument in the Court of Appeals in this case, the Government conceded that this distinction is not valid and that the present case and the *Moore* decision cannot properly stand

together (R. 220). The court below, noting that it was not bound by the Fifth Circuit's conclusions, found it unnecessary to determine whether the same or a different issue was presented and decided in the *Moore* case because it held that the Tax Court's present result was correct in either event (R. 220). And there is added to this implicit recognition of a conflict the fact that the explicit rationale of the opinion below cannot be squared with that expressed by the Fifth Circuit.

It may be, of course, that the Fifth Circuit would in future cases accept the unsubstantial distinction made here by the Tax Court, but to do so it seems to us that it would either have to overrule its *Moore* decision or discard the entire reasoning upon which it reached its independent conclusion that the Tax Court had properly construed the statute. In these circumstances, we believe that there is presented a conflict of Circuits warranting resolution by this Court.

Accordingly, the respondent, though believing that the decision in the present case is correct, does not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

MAY 1949.

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